

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAMES D. HARMAN and DEPARTMENT OF LABOR,  
MINE SAFETY & HEALTH ADMINISTRATION, Wilkes Barre, Pa.

*Docket No. 97-611; Submitted on the Record;  
Issued August 27, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation Programs correctly determined that appellant's claim for compensation benefits is barred by the applicable time limitation provision of the Federal Employees' Compensation Act.<sup>1</sup>

On April 13, 1994 appellant, then a 56-year-old former coal mine inspector, filed a notice of occupational disease and claim for compensation alleging that he sustained a respiratory condition, diagnosed as black lung, causally related to his duties as an underground coal mine inspector. On his application appellant indicated that he first became aware of the disease and its relationship to his employment on May 1, 1981. A copy of a 1992 award for black lung benefits was included with the evidence of record. In this award, it is noted that appellant worked in the coal mines from 1959 to 1984. He was awarded benefits effective August 1, 1990 and continuing.

Appellant was involuntarily terminated from employment effective March 13, 1984. Appellant's statement indicated that his employing establishment was aware as early as December 1982 of his disability. In support of this statement, appellant submitted a letter dated February 28, 1986 from Shigeki Sugiyama, Associate Special Counsel for Planning and Oversight of the Merit Systems Protection Board. This letter indicated that appellant filed a complaint stating that his termination was in reprisal for disclosures made about Mine Safety and Health Administration (MSHA) officials and that the record of his performance deficiencies were documented as early as December 1982. There is no reference made concerning any known disability. The statement supplied by the employing establishment indicated that appellant did not bring to Mr. James Schoffstall, appellant's immediate supervisor, any physical condition that would interfere with his inspection duties. The factual information concerning the termination indicated that it was for poor performance.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

Medical evidence in the file is dated beginning in 1971. Chest x-rays taken for the MSHA testing program for the period April 1971 through July 1983 all displayed negative results. Pulmonary function studies, along with physical examination reports indicate a decreasing respiration due to infiltrations in the lungs. There is no indication in the record that appellant's supervisor was made aware of any physical condition that might have interfered with appellant's job duties.

By decision dated October 26, 1995, the Office denied benefits as the evidence did not establish that a timely claim was filed. The Office noted that appellant advised that he was aware of his condition and its relationship to his employment on May 1, 1981. Additionally, his last date of exposure was March 1984. He did not file a claim within three years as required by law, and, thus, the claim was denied.

By letter dated November 25, 1995, appellant requested an oral hearing.

At the hearing, appellant was advised that the issue was not medical in nature, but rather involved the timeliness of the filing of his claim. Appellant testified that he began working in the coal mines in 1971 and that he had his first symptoms associated with respiration in 1981. He filed a claim for black lung benefits at that time. A copy of a letter substantiating this was presented into the record in the form of a letter to Senator Arlen Specter.

Appellant also gave testimony pertaining to his involuntary separation from his position. This information, however, is irrelevant to the issue of timeliness and will not be addressed. Appellant indicated that he wanted a waiver of the timeliness standards as he had been treated badly in regards to his job and his condition.

In a decision dated August 22, 1996, the hearing representative affirmed the Office's October 26, 1995 rejection of appellant's claim.

The Board finds that appellant failed to meet the time limitation for filing a claim for compensation.

In cases of injury on or after September 7, 1974, section 8122(a) of the Act<sup>2</sup> provides that a claim for disability must be filed within three years after the injury. However, section 8122(b) of the Act<sup>3</sup> provides that the time for filing a claim for latent disability, as in this case, "does not begin to run" until the employee is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between his compensable disability and his employment.<sup>4</sup> Where the employee continues in the same employment, after such awareness, the time limitation begins to run on the date of his last exposure to the implicated factors.<sup>5</sup>

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<sup>2</sup> 5 U.S.C. § 8122(a).

<sup>3</sup> 5 U.S.C. § 8122(b).

<sup>4</sup> See section 10.105(c).

<sup>5</sup> *Hugh Massengill*, 43 ECAB 475 (1992).

In the instant case, appellant specifically noted that he was aware of his condition and its relationship to his job in 1981. At that time, he filed a black lung claim. The evidence does not reflect that appellant's immediate supervisor had actual knowledge of the claimed injuries within 30 days or that written notice of the claimed injuries was given within 30 days. Even utilizing the latent disability clause, appellant must have filed a claim within three years of his last exposure. Appellant's last exposure was in March 1994. Thus, in order to be timely filed, appellant must have initiated his workers' compensation claim in 1987. The evidence of file shows that the claim was not filed until April 13, 1994, more than three years after his last exposure. Having duly considered the evidence of record, the Board finds that appellant failed to meet the time limitation for filing a claim for compensation.

The August 22, 1996 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.  
August 27, 1998

Michael J. Walsh  
Chairman

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member